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No. 17-532

In the
Supreme Court of the United States

CLAYVIN HERRERA,

PETITIONER,

v.

WYOMING,

RESPONDENT.

On Petition for a Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF FOR TIMOTHY P. MCCLEARY, JANINE PEASE, ELIZABETH SWANK, AND ESTHER WYNNE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 2

Argument 3

A. The Crow Tribe Has Protected The Right To Hunt In Its Treaties With The United States ... 3

B. Retracting The Right To Hunt Will Threaten Public Health On The Crow Reservation 10

Conclusion 13

Appendix A — Dry Meat Stew Recipe 1a

TABLE OF AUTHORITIES

Cases:

Confederated Tribes of Umatilla Indian Reservation v. Maison, 262 F. Supp. 871 (D. Or. 1966) 9

Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995) 8, 9, 10, 13

Holcomb v. Confederated Tribes of Umatilla Indian Reservation, 382 F.2d 1013 (9th Cir. 1967) 10

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997) 8

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 9

Montana v. United States, 450 U.S. 544 (1981) 3, 4, 5, 6

United States v. Backlund, 689 F.3d 986 (9th Cir. 2012) 9

United States v. Finch, 395 F. Supp. 205 (D. Mont. 1975) 4, 5

United States v. N. Pac. Ry. Co., 311 U.S. 317 (1940) 5

United States v. Winans, 198 U.S. 371 (1905) 4, 8, 12

Ward v. Race Horse, 163 U.S. 504 (1896) 7, 8, 9

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 7

Statutes, treaties, and rules:

16 U.S.C. § 475 9
16 U.S.C. § 551 9
16 U.S.C. § 1604 9
An Act to Establish Peace with Certain Hostile Indian Tribes, 15 Stat. 17 (July 20, 1867) .. 5
Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013) 2, 9
Treaty with the Crow Tribe, U.S.-Crow, Aug. 4, 1825, 7 Stat. 266, 1825 WL 3194 ..... 3, 4
Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749, 1851 WL 7655, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904) 4, 6
Treaty with the Crow Tribe, U.S.-Crow, May 7, 1868, 15 Stat. 649, 1868 WL 24283 ..... *passim*
36 C.F.R. § 261.10 9
Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897) 5, 9
SUP. CT. R. 37 1

Miscellaneous:

Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521 (2014) 5
Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009) 7

Anne Gordon & Vanessa Oddo, *Addressing Child Hunger and Obesity in Indian Country: Report to Congress* (Jan. 12, 2012) 12

James Hagengruber, *Elk-Teeth Dress is Epitome of Crow Status and Style*, BILLINGS GAZETTE, Apr. 13, 2002 10

Peggy Halpern, *Obesity and American Indians / Alaska Natives* (Apr. 1, 2007) ... 11

Valerie Blue Bird Jernigan et al., *Food Insecurity Among American Indians and Alaska Natives*, 12 J. HUNGER & ENVTL. NUTRITION 1 (2016) 12

CDC Office for State, Tribal, Local & Territorial Support, *American Indian and Alaska Native Hunting and Fishing Rights* 12

INST. FOR THE DEV. OF INDIAN LAW, PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867–1868 (1975) 6

Brief of National Congress of American Indians et al. as Amici Curiae Supporting Respondents, *Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337 (U.S. Sept. 25, 1998) 8

USDA Economic Research Service, Food Access Research Atlas, https://www.ers.usda.gov/data-products/food-access-research-atlas/go-to-the-atlas/ 11

INTEREST OF AMICI CURIAE*

Amici curiae have devoted their careers to studying, educating, and treating the Crow Tribe of Indians. Because the decision below imperils public health by trampling the Tribe's treaty-protected right to hunt, amici file this brief in support of petitioner. The signatories to the brief, with affiliations provided for identification purposes only, are as follows:

Timothy P. McCleary, Ph.D., is an anthropology professor at Little Big Horn College in Crow Agency, Montana. He speaks and reads the Crow language, and has spent much of his career researching, teaching, and writing about the origins, history, and contemporary beliefs and practices of the Crow people.

Janine Pease, D.Ed., is the founding president of Little Big Horn College, a recipient of the MacArthur "genius grant," and a former trustee of the Smithsonian's National Museum of the American Indian. She now teaches Crow Studies and other disciplines at Little Big Horn College. A member of the Crow Tribe, she is the great-granddaughter of White Man Runs Him, one of the Crow scouts who served with Lieutenant Colonel George Armstrong Custer at the Battle of the Little Bighorn.

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* Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici's intent to file this brief, and consented to it. Petitioner's and respondent's letters giving blanket consent to amicus briefs are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

Elizabeth Swank serves as the Public Health Emergency Preparedness Coordinator for the Public Health Department of Big Horn County, Montana, much of which is covered by the Crow reservation. As the spouse of a Crow hunter, she has firsthand knowledge of the dietary importance of keeping a freezer stocked with fresh elk meat throughout the long Montana winters.

Esther Wynne, R.N., B.S.N., P.H.N., serves as the Public Health Nurse for the Public Health Department of Big Horn County, Montana. After a quarter-century in that role, she has in-depth experience and understanding regarding the cultural and nutritional aspects of subsistence hunting, the importance of elk meat in the Crow way of life, the persistence of hunger on the Crow reservation, and the prevalence of obesity and type 2 diabetes among native peoples who eat a grain-based diet instead of their traditional game-based diet.

SUMMARY OF ARGUMENT

The Apsaalooke people, known in English as the Crow Tribe of Indians, have "always valued hunting and gathering in Crow Country as an activity of the highest cultural importance and the means for survival." Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj. The Tribe's right to hunt is so important that it has merited explicit protection in two different treaties with the United States. In this case, the Court is asked to interpret one of those treaties and to decide "whether the Tribe's members can engage in subsistence hunting foundational to their identity and well-being." Pet. 28.

Amici respectfully submit that this important question of treaty interpretation should not be left to an intermediate state court. If allowed to stand, the decision below could harm the many members of the Crow Tribe who still rely on traditional subsistence hunting to feed their families during the winter. To avoid these public-health consequences, this Court should grant the petition, enforce the treaty, and restore the Crow Tribe's usufructuary rights.

ARGUMENT

A. The Crow Tribe Has Protected The Right To Hunt In Its Treaties With The United States.

This case is about the last in a series of treaties between the Crow Tribe and the United States, called the Second Treaty of Fort Laramie. In that 1868 document, the Tribe agreed to give up a significant amount of territory but took care to preserve its right to continue hunting, which remains vitally important to the Crow way of life.

1. The Crow Tribe migrated some three centuries ago to what is now southern Montana and northern Wyoming. *See Montana v. United States*, 450 U.S. 544, 547 (1981). In 1825, "[t]he United States agree[d] to receive the Crow tribe of Indians into their friendship [and] protection." Treaty with the Crow Tribe, U.S.-Crow, art. 2, Aug. 4, 1825, 7 Stat. 266, 1825 WL 3194. The United States undertook to regulate trade with the Tribe, *see id.* arts. 3–4, and to punish private violence against its members, *see id.* art. 5. In return, the Tribe gave an acknowledgment of United States supremacy, *see id.* art. 1, a promise not to supply weapons to enemies of

the United States, *see id.* art. 6, and a commitment to protect traders and others "authorized by the United States to pass through their country," *see id.* art. 4, among other things. This first treaty did not purport to define "the limits of [the Tribe's] district of country," *id.*, or otherwise constrain tribal hunting. *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

In 1851, "warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie." *Montana*, 450 U.S. at 547. The signatory tribes agreed "to make an effective and lasting peace" among themselves, to give safe passage to settlers heading for California, and to "acknowledge [designated] tracts of country . . . as their respective territories." *See* Treaty of Fort Laramie, arts. 1, 4, 5, Sept. 17, 1851, 11 Stat. 749, 1851 WL 7655, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 594–96 (1904); *see also id.* arts. 2, 3, 7, 8 (assigning rights and obligations to the United States). In a sign of what really mattered, the Crow Tribe took care not to "surrender the privilege of hunting, fishing, or passing over" the territory that was designated for the other tribes. *See id.* art. 5. The designated Crow territory, confined to roughly 38.5 million acres in present-day Montana and Wyoming, was likewise subject to the usufructuary rights of the other tribes. *See id.*; *Montana*, 450 U.S. at 548; *United States v. Finch*, 395 F. Supp. 205, 215 (D. Mont. 1975) (mapping Crow territory circa 1851).

By 1867, continuing bloodshed in the West prompted the United States to create the Great Peace Commission, which went on to secure nine separate peace treaties with various tribes. *See* Note, *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521, 2522–27 (2014) (recounting the history surrounding An Act to Establish Peace with Certain Hostile Indian Tribes, 15 Stat. 17 (July 20, 1867)). The Crow Tribe entered into one of those peace treaties in 1868, known as the Second Treaty of Fort Laramie. *See* Treaty with the Crow Tribe, U.S.-Crow, art. I, May 7, 1868, 15 Stat. 649, 1868 WL 24283. That document established a reservation on roughly 8 million acres in present-day Montana that would be "set apart for the absolute and undisturbed use and occupation of" the Crow Tribe, and on which the United States was to build a school and other buildings. *See id.* arts. II, III. The other 30 million or so acres of Crow territory were ceded to the United States. *See id.* art. II; *Montana*, 450 U.S. at 548; *United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 354 (1940); *Finch*, 395 F. Supp. at 216 (mapping the Crow reservation circa 1868). A portion of the ceded lands would later become the Bighorn National Forest. *See* Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897).

Crucially, for purposes of this case, the Second Treaty of Fort Laramie again "addressed hunting rights specifically," with respect to the "lands outside the reservation boundaries." *Montana*, 450 U.S. at 559 n.7. The Crow Tribe agreed to make a permanent home on the much smaller reservation, but carefully reserved "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace

subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crow Tribe, U.S.-Crow, art. IV, May 7, 1868, 15 Stat. 649, 1868 WL 24283. The United States was willing to buy peace at that price in the wake of the Civil War. To be sure, incentives for farming were also put in place. *See id.* art. VI (giving acreage to "Indians [who] shall desire to commence farming"); *id.* art. IX (appropriating "ten dollars . . . annually . . . for each Indian roaming, and twenty dollars for each Indian engaged in agriculture"). But as Chief Blackfoot told the Great Peace Commission, the Crow Tribe would go on hunting:

> There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming.

Montana, 450 U.S. at 573 n.7 (Blackmun, J., dissenting) (emphasis omitted) (quoting INST. FOR THE DEV. OF INDIAN LAW, PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867–1868, at 91 (1975)).

The Crow Tribe thus guarded its preexisting usufructuary rights in the treaties that shrank its territory down to 38.5 million acres, and then down to 8 million acres. Given the central importance of hunting on the ceded lands to the Crow way of life, it is hardly surprising that the right to hunt was expressly protected in both the First and Second

Treaties of Fort Laramie. As Justice Brown wrote of the Bannock Tribe:

> The right to hunt was not one secured to [the Indians] for sporting purposes, but as a means of subsistence. . . . [T]heir chief reliance for food has been upon the chase. The right to hunt on the unoccupied lands of the United States was a matter of supreme importance to them, and as a result of being deprived of it they can hardly escape becoming a burden on the public.

Ward v. Race Horse, 163 U.S. 504, 518 (1896) (Brown, J., dissenting). In fact, members of the Crow Tribe were so determined to retain their treaty right that they later agreed to serve as scouts for the United States Army in the Plains Indian Wars, including at the Battle of the Little Bighorn. After doing so much to protect the right to hunt, they have continued off-reservation hunting on the ceded lands, particularly in the Bighorn Mountains.

2. If the Crow Tribe is now to be stripped of these usufructuary rights, which the United States recognized in the Second Treaty of Fort Laramie and the Crow fought alongside Custer to preserve, such a decree ought to come from the Supreme Court of the United States, not an intermediate state court. After all, "[a] treaty . . . between the United States and an Indian tribe[ ] is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). At the very least, this Court should call for the views of the Solicitor General. *See* Matthew L.M. Fletcher, *Factbound and Splitless: The*

Certiorari Process as Barrier to Justice for Indian Tribes, 51 ARIZ. L. REV. 933, 940 n.29 (2009) ("In Indian law cases, a CVSG is a common cert pool recommendation because of the special experience—and the special relationship—that the federal government has with Indians and Indian tribes."). As Solicitor General Henry M. Hoyt once explained, "[t]he Government has always striven against disparity between our promises when obtaining treaties and the actual meaning of the instrument as it is sought to be construed when the greed of white settlers is aroused." *Winans*, 198 U.S. at 372.

Contrary to the decision below, and as petitioner ably explains, no justification for clawing back this treaty right can be found in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). In that case, the Tenth Circuit wielded *Race Horse*'s equal-footing doctrine against the Crow Tribe by holding that Wyoming's admission to the Union in 1890 repealed the right to hunt under the Second Treaty of Fort Laramie. *See Repsis*, 73 F.3d at 987–93 (relying on *Ward v. Race Horse*, 163 U.S. 504 (1896)). A circuit split over this vital issue quickly emerged, leading to a grant of certiorari within three short years. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 926–29 (8th Cir. 1997), *cert. granted*, 524 U.S. 915 (1998) (No. 97-1337). The Crow Tribe, which had been shocked by *Repsis*, joined an amicus brief arguing that *Race Horse* should be overruled. *See* Brief of National Congress of American Indians et al. as Amici Curiae Supporting Respondents, *Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337 (U.S. Sept. 25, 1998).

This Court apparently agreed with the amicus brief, holding that *Race Horse* "has been qualified by later decisions" because it "rested on a false premise," and that "[t]reaty rights are not impliedly terminated upon statehood." *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–08 (1999); *see also id.* at 219–20 (Rehnquist, C.J., dissenting) (lamenting that the majority "effectively overrules *Race Horse sub silentio*"). Unlike the Tenth Circuit, this Court did not "view *Race Horse* as compelling, well-reasoned, and persuasive." *Repsis*, 73 F.3d at 994. Having succeeded in undercutting *Repsis*, the Crow Tribe advised federal and state officials that its "policy . . . shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States . . . located within the traditional Crow homeland," under the Second Treaty of Fort Laramie. *See* Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj (observing that *Mille Lacs* "squarely rejected" *Repsis*).

To be sure, the Tenth Circuit gave an alternative basis for extinguishing the Crow Tribe's right to hunt: The Bighorn National Forest is not "unoccupied" within the meaning of the Second Treaty of Fort Laramie. *See Repsis*, 73 F.3d at 993. But the belt is no better than the suspenders, because the United States restricts occupancy of national forest lands. *See, e.g.*, 16 U.S.C. §§ 475, 551, 1604(*i*); 36 C.F.R. § 261.10; Proclamation No. 30, 29 Stat. 909–10 (Feb. 22, 1897); *United States v. Backlund*, 689 F.3d 986, 990 (9th Cir. 2012). Little wonder, then, that most courts have treated national forest lands as unoccupied for treaty-interpretation purposes. *See, e.g., Confederated Tribes of Umatilla*

Indian Reservation v. Maison, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd sub nom. Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967) (holding that national forest lands are "not occupied by white settlers," and thus are "unclaimed" within the meaning of a treaty that reserved usufructuary rights); Pet. 24–27 (collecting additional cases). It makes no sense to say that "creation of the Big Horn National Forest resulted in the 'occupation' of the land"—unless perhaps the elk are the occupants. *Repsis*, 73 F.3d at 993.

B. Retracting The Right To Hunt Will Threaten Public Health On The Crow Reservation.

Although the Second Treaty of Fort Laramie is now approaching its sesquicentennial, petitioner and his fellow "members of the [Crow] Tribe . . . depend upon their treaty-protected hunting rights to feed their families to this day." Pet. 3. By curtailing the longstanding right to hunt outside the limits of the reservation, the decision below poses a dire threat to this vulnerable population.

For centuries, the Crow Tribe has enjoyed a heavily meat-based diet that includes bison, elk, deer, antelope, and other wild game. Elk became particularly important as bison herds dwindled, offering a steady source of fresh meat, hides, and the eponymous component of the prized elk-teeth dress. *See, e.g.*, James Hagengruber, *Elk-Teeth Dress is Epitome of Crow Status and Style*, BILLINGS GAZETTE, Apr. 13, 2002, https://goo.gl/iyVc34. The Bighorn Mountains of Wyoming, located within the Bighorn National Forest that was made with the Tribe's ceded lands, are the sacred hunting grounds according to

Crow oral tradition: In the story of Big Metal, seven bighorn rams rescue a stranded Crow boy, share with him their name and powers, and promise that hunters from the Tribe of which he will be chief can always find plentiful game just by visiting the Bighorn Mountains and thinking about the rams who saved Big Metal.

Members of the Crow Tribe continue to put "food on the table during unforgiving Montana winters" by hunting elk, in the Bighorn Mountains and beyond. Pet. 29. Traditionally, elk is served to respected guests as the main ingredient in "dry meat stew." *See* App'x, *infra*. In a modern twist, petitioner nourished his children with "elk spaghetti and elk 'Hamburger Helper.'" Pet. 9 n.4. Any way you slice it, though, elk meat is good, wholesome, and traditional food, packed with healthy lean protein. *See, e.g.*, Peggy Halpern, *Obesity and American Indians / Alaska Natives* 17 (Apr. 1, 2007), *available at* https://goo.gl/za6k71 (noting that "traditional foods are high in protein and low in fat and sugar").

Losing access to off-reservation elk and other game will be especially harmful on the Crow reservation, which is located in a "food desert." *See* https://www.ers.usda.gov/data-products/food-access-research-atlas/go-to-the-atlas/ (enter "Crow Agency, MT, USA" in search box). Even members of the Tribe with money to spend have a hard time obtaining fresh meat and vegetables at a well-stocked grocery store within easy traveling distance. The Crow reservation is not unique in this regard: "In Indian Country, access to food can be a challenge. Many reservations have significant food deserts, which are

defined as low-income communities without ready access to healthy and affordable food." Anne Gordon & Vanessa Oddo, *Addressing Child Hunger and Obesity in Indian Country: Report to Congress* 5 (Jan. 12, 2012), *available at* https://goo.gl/iVZPLa. Such heightened food insecurity increases the risks of obesity, type 2 diabetes, and hypertension, among other maladies. *See id.* at 6–15; Valerie Blue Bird Jernigan et al., *Food Insecurity Among American Indians and Alaska Natives*, 12 J. HUNGER & ENVTL. NUTRITION 1 (2016).

Access to fresh meat through hunting can help to alleviate these public-health problems, as recognized by the leading federal agency in such matters:

> The Centers for Disease Control and Prevention (CDC) is committed to endorsing traditional foods as an effective approach for health promotion and diabetes prevention in American Indians and Alaska Natives . . . . Hunting and fishing rights are significant in a public health context because many tribal communities rely on these traditional foods for subsistence.

CDC Office for State, Tribal, Local & Territorial Support, *American Indian and Alaska Native Hunting and Fishing Rights*, *available at* https://goo.gl/LxSYv9. More than a century ago, the Court wrote that usufructuary rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). As the CDC attests, those rights remain important to the health and well-being of native populations.

* * *

The Second Treaty of Fort Laramie has been quite a deal for the United States, which received peace in the aftermath of the Civil War, along with 30 million acres of Crow territory that gave rise to what is now the Bighorn National Forest. The Crow Tribe should also enjoy the benefit of the bargain, which amounts to subsistence hunting in the forest lands it ceded away. Notwithstanding the decision below and *Repsis*, there is no basis in precedent, policy, or common sense for depriving the Tribe of that benefit. If the United States need not be held to honoring even that meager promise, then this Court should be the one to deliver the news.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

Here's what's cookin' **Dry Meat Stew** *Serves* 10 to 15

Recipe from the kitchen of **Brenda Bull Shows**



5 lbs. dried elk meat

1 lb. salt pork

cover with water and boil for 1 hour

3 lbs. of potatoes, washed and quartered

add to stew and return to boil for 30 mins.

serve with fry or pan bread and berry pudding